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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND MARTIN, Defendant and Appellant.	C058391 (Super. Ct. No. 05F11358)
THE PEOPLE, Plaintiff and Respondent, v. VINCENT GREGORY, Defendant and Appellant.	C058392 (Super. Ct. No. 05F11358)
THE PEOPLE, Plaintiff and Respondent, v. STANLEY MASON, Defendant and Appellant.	C058633 (Super. Ct. No. 05F11358)

Arthur Doug Cline and Anna McDonald were asleep in Cline's bedroom when defendants Raymond Martin, Vincent Gregory, and Stanley Mason, all wearing masks, broke into Cline's home, restrained Cline with zip ties, and demanded Cline's wallet. When Cline resisted, Gregory fired his weapon, killing Cline and wounding McDonald. Cline was a small time methamphetamine dealer. Gregory was one of his clients. Gregory believed Cline had cheated him on a drug deal, and decided to rob Cline in retaliation.

Defendants were convicted by separate juries of the first degree felony murder of Cline. Each jury found true the special circumstance allegation that the murder was committed during the commission of a robbery and burglary, resulting in a sentence for each defendant of life without the possibility of parole. In addition to the murder convictions, all three defendants were convicted of first degree burglary and robbery, and of assault with a deadly weapon upon McDonald. They each received an additional sentence of nine years for the assault. The sentences for the robbery and burglary were stayed.

The Gregory jury found true the allegations that he personally used and discharged a firearm, for which he received an additional 10 year sentence. The Mason and Martin juries found true the allegation that a principal was armed with a firearm during the commission of the crime, for which they each received an additional one year sentence. The trial court found true the allegations that Martin had suffered one prior serious

felony conviction and had served six prior prison sentences, for which he received an additional three year sentence.

Gregory raises several claims of instructional error. Specifically, he claims the robbery instruction was erroneous because it did not inform the jury he was required to have an intent to permanently deprive the victim of his property. We shall conclude this instruction was proper, since there were no facts to indicate Gregory intended only to temporarily deprive the victim of his property. Gregory claims his jury should have been given lesser included offense instructions on second degree murder, manslaughter, and involuntary manslaughter. We shall conclude these lesser offenses were not supported by the evidence, and that any failure to give the instructions was harmless. Gregory claims the trial court failed to instruct that assault is a specific intent crime. We shall conclude the instruction regarding assault was correct.

We shall also reject Gregory's claims of ineffective assistance of counsel and prosecutorial misconduct. Gregory claims the trial court erred when it allowed prejudicial gang evidence to be admitted. We shall conclude there was no prejudice. We shall further conclude Gregory forfeited his argument that his right to counsel and to be present was violated.

With regard to sentencing, we find no error in the imposition of the upper term for Gregory's assault conviction, and that the restitution order which related in part to trial expenses was not a punishment; therefore, it did not violate

Gregory's right to a jury trial. We conclude the other fines were correctly pronounced and imposed by the trial court.

Mason raises several evidentiary claims, specifically that evidence was admitted of which the witnesses had no personal knowledge, that loss of memory does not amount to a prior inconsistent statement, and that certain evidence was irrelevant. We shall conclude the trial court did not abuse its discretion in admitting the evidence.

Mason claims there was insufficient evidence that he acted with reckless indifference to human life, and thus, there was insufficient evidence to support the special circumstance resulting in his life sentence. We shall conclude the evidence was sufficient to support the special circumstance.

Martin claims the trial court erred in admitting evidence of Gregory's statement implicating him and in excluding evidence presented by his expert witness with respect to his knowing and intelligent *Miranda*[1] waiver. We shall conclude Gregory's statement was admissible, non-testimonial hearsay, and that the expert's opinion was properly admitted into evidence.

We reject Martin's claim of police misconduct in frightening a witness as forfeited because it was not raised below, and find the trial court did not err when it determined

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1 *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

the confidential informant, whose identity Martin sought, was not a material witness on the issue of guilt.

Martin claims the trial court should have instructed the jury on the lesser included offense of involuntary manslaughter. We conclude this error was harmless, since the jury found the murder was committed while Martin was engaged in the commission of a burglary and robbery. Therefore, the killing was necessarily first degree, and no involuntary manslaughter instruction was necessary. Martin's claim that he was denied equal protection on this ground was likewise harmless.

All three defendants argue the trial court erred in failing to award them pre-sentence custody credits for actual time served, and for imposing a parole revocation fine when they were sentenced to an indeterminate term without the possibility of parole. We recognize defendants have preserved their argument with regard to custody credits, but we decline to amend the judgment given their life without parole sentence. We further conclude the parole revocation fine was properly imposed because each defendant was sentenced to a determinate term in addition to the life term, and the parole revocation fine is statutorily required for such sentences.

We shall affirm the judgment in all respects.

FACTUAL AND PROCEDURAL BACKGROUND

The victim, Doug Cline, and his roommate Jeff Alexander shared a duplex. Cline worked in construction, but also sold small amounts of methamphetamine to his friends. Among Cline's friends were Travis Harris, who was Gregory's "street father"

(i.e., not Gregory's biological father, although he treated Gregory as such), and Christopher Robison, Gregory's "street uncle."

On December 26, 2005, Cline, Gregory, and Harris were at Cline's house in the bedroom, and Cline and Harris were playing video games. Cline told Gregory that he did not want Gregory bringing Martin to his house. Before long, Cline and Gregory were fighting, and Cline ended up with a red eye. Harris took Gregory out of the room, and Gregory left the house.

The next day, December 27, 2005, Gregory and Mason showed up at Cline's house around 8:00 or 8:30 p.m. Gregory was wearing a 49er jacket. Gregory told Cline he wanted his money back for some bad dope. Cline told Gregory to have Harris bring back the dope. Harris testified that Gregory said that he got into an argument with Cline, and that Cline would not let him in the house. Gregory reported that Cline had told him, "FU, you're burnt," and shut the door in Gregory's face. Gregory was mad.

A little later that night, Nicole Fernandez, Gregory's girlfriend, heard Gregory and Mason talking. They were talking about collecting $200 from someone that had ripped them off. Fernandez figured out that they were talking about Cline, and that they planned to rob him. Gregory, Mason, and Fernandez were at the apartment of Ericka Reed with Robison and Jessica Marsh. They did some methamphetamine, and Gregory and Mason left.

At 12:45 a.m. on December 28, Gregory called Martin. Martin did not want to talk to Gregory, but Gregory persisted, calling repeatedly until around 1:00 a.m. Finally, Harris called Martin around 1:15 a.m., and Martin took the call. After Martin talked to Harris, Gregory called Martin again, and Martin took the call. Immediately afterward, Martin had his girlfriend, Danielle Davison, give him a ride to an apartment that belonged to Martin's friend, Lisa Lindeman. Lindeman's daughter, Amanda Miller, and Amanda's boyfriend were living at the apartment. Also at Lindeman's apartment were Gregory and Mason. Gregory had a black commemorative handgun. Gregory was showing off his gun, saying, "Look what I have." Davison told police that while they were at Lindeman's house, she overheard a plan to rob Cline. Gregory asked Miller if she had any pantyhose that he could put over his face.

Martin and Davison left the apartment around 5:00 a.m. Gregory and Mason left around the same time. Gregory was driving his girlfriend's car with Mason as a passenger. Martin drove another vehicle, and Davison followed in her car. Davison understood they were going to Harris's house.

Along the way, Martin drove his vehicle (which belonged to Lindeman) into Davison's car and another car. The three vehicles carrying defendants and Davison left the scene of the accident without stopping and parked on a side street, where they emptied the contents of the car Martin had been driving into Davison's vehicle. Martin proceeded on in Davison's car with Davison driving. Gregory called Martin on Davison's cell

phone and said he had decided not to go to Harris's, but instead to go rob Cline, and Martin agreed. Around 5:30 a.m. Davison let Martin out of her car, and he climbed into the car with Gregory and Mason. Before leaving Davison's car, Martin grabbed a long dark coat with a fur collar.

Martin, Gregory, and Mason went to Cline's house. Martin and Gregory went into Cline's bedroom and found Cline and Anna McDonald asleep on Cline's bed. Gregory tied Cline's hands with zip ties. They took Cline's money from his wallet and some dope from the bathroom.

McDonald woke up to a man standing over her and pointing a gun at her. He was wearing a black ski mask with a white bandana tied around it, a baseball cap, and a 49er jacket. The other person had on a dark blue parka with fur around the hood and a light blue ski mask. Cline's hands were tied up in front of him with plastic zip ties, and he was awake.

There was a third intruder at the door of the bedroom. He was wearing a black mask. Cline said to the person holding the gun, "Why are you doing this, Vince[?]" Cline asked this over and over, saying, "Vince, why are you doing this? I have kids. I have a daughter and -- two daughters and family, you know." Finally, the man with the gun said, "Why does he keep on saying my name?"

The man with the gun (Gregory) asked Cline where his keys were. They found the keys and started to go to Cline's truck. At this point, Cline said, "Fuck this," and charged Gregory. Gregory fired at Cline, and Cline fell towards the gunman. The

gunman shot twice more. McDonald was shot in the leg. Cline fell to the floor, and the intruders ran out.

Alexander, the roommate, was awakened by the gunshots. He saw three men run past the open door of his bedroom. Alexander came out of his bedroom and called 911.

Sometime between 6:00 and 7:00 in the morning, defendants arrived back at Reed's apartment, where Robison, Fernandez, Marsh, Reed, and others were. They stayed there about 20 minutes. While they were there, they were going in and out of the bathroom and using profanity. Gregory was saying "Everyone get the F away from me, don't touch me," and was very agitated, hyper, and upset. Mason kept looking out the front window. He was "white as a ghost." Both Gregory and Mason appeared stressed.

Robison asked Gregory what had happened because Mason "was freaking out." Gregory said that things had gone bad at Cline's, and that Cline got shot. Robison tried to help Gregory come up with a plan, and told Gregory to get out of town and to make sure he took everything he had brought with him to Reed's apartment. Gregory also told Fernandez that he shot Cline twice, the first time in the gut. Later, Fernandez heard Mason say they had either blasted or booted someone in the head.

Gregory called Harris's cell phone. Gregory was distraught and crying. Harris met Gregory at Harris's house. Gregory was carrying a black semi-automatic handgun. He was fidgety and appeared to be under the influence of methamphetamine. Gregory told Harris that he thought Cline was dead. He said that Martin

told him to shoot, and he shot Cline. Gregory told Harris that both he and Martin had been armed. He said he shot Cline in the chest and head.

Around 7:45 or 8:00 a.m., Reed found a cell phone outside her apartment. She took it back to her apartment, where it started ringing. Reed answered the phone in speaker mode. The person on the other end asked for Doug. Robison assumed it was Cline's cell phone, and started making motions with his hand across his throat telling her to cut off the call. Robison then wrote on a yellow pad, "Hang up, bad, got problems with my nephew[.]" Robison made her give him the telephone. Robison broke the phone and threw it in a dumpster.

The authorities, having spoken with McDonald and determined that Gregory was a likely suspect, went to Harris's address at approximately 9:00 a.m. They set up surveillance at the residence. As they watched, Fernandez and Gregory pulled up and parked in front of Harris's residence. Christine Shepherd, Harris's girlfriend, came out of the residence and got into the car. As the car left the house it lost traction and was hit by a pickup truck. An officer observed Gregory get out of the car and fumble with something at his waistband. He then stuck his hand into the pockets of his sweatshirt and held his hands tight against his waist. He walked back into Harris's house, was gone about a minute, then came back. When he returned, he was no longer clutching his waist, but had his hands down by his side. Gregory later told detectives that he put the gun under the sink under a garbage bag.

The gun was retrieved from the location given by Gregory. The gun was test-fired, and the cartridge casings matched those recovered from the murder scene. The bullet recovered from Cline's body was also fired from the gun. A number of items were recovered from Fernandez's house, including Cline's wallet, containing his photo identification and three masks, as well as clothing consistent with that worn by Cline's attackers. DNA testing was performed on some of the items found. DNA consistent with Mason's was found on a white sleeve that had been torn off a shirt and fashioned into a mask. Another mask appeared to have been fashioned out of a black shirt and a white bandana. This mask contained DNA consistent with Gregory's DNA. The white bandana contained a blood stain that was consistent with Cline's DNA. Cline's blood was also found on a glove. Another pair of gloves contained DNA consistent with Martin's DNA.

I

Gregory's Appeal

A. *Robbery Instruction--Intent to Permanently Deprive*

Gregory argues that the trial court omitted a critical element of the robbery instruction when it failed to instruct that robbery required an intent to deprive the owner of his property for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property. We shall conclude that the instructions were proper.

The standard version of CALCRIM No. 1600 states the intent element of robbery: "When the defendant used force or fear to

take the property, (he/she) intended (to deprive the owner of it permanently/[or] to remove it from the owner's possession *for so extended a period of time* that the owner would be deprived of a major portion of the value or enjoyment of the property)." (Italics added.) The version the trial court gave the jury omitted the italicized phrase. Gregory argues that without the time element, an intent to temporarily deprive the owner of the enjoyment of the property for a brief period would suffice as an intent to steal.

The instruction given correctly stated the law even without the temporal element of the standard instruction. Moreover, there was no possible prejudice where evidence the defendants intended to deprive Cline of his property only temporarily was nonexistent.

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.)[2] The intent element of robbery is the intent to steal or feloniously deprive the owner permanently of his property. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1037 (conc. opn. of Werdegar, J.).) The intent element is common to robbery and theft. (*People v. Tufunga* (1999) 21 Cal.4th 935, 946.)

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[2] References to an undesignated section are to the Penal Code.

The Supreme Court has recognized that the requisite intent to steal is present where even a temporary taking will deprive the owner of the primary economic value of the property. (*People v. Avery* (2002) 27 Cal.4th 49, 57.) "[W]e agree with the Court of Appeal in *People v. Zangari*, *supra*, 89 Cal.App.4th at page 1443, . . . that 'the intent to deprive an owner of the main value of his property is equivalent to the intent to permanently deprive an owner of property.'" (*Ibid.*)

Although the standard instruction correctly describes the *animus furandi* as either an intent to permanently deprive or an intent to deprive for so extended a period of time that the owner loses the primary value of the property, the focus is on the owner's loss of the main value of the property, not the length of the deprivation. Thus, there is sufficient felonious intent even though the taking is temporary, if such temporary taking "will deprive the owner of its primary economic value, e.g., when the property is dated material or perishable in nature or good for only seasonal use." (*People v. Avery*, *supra*, 27 Cal.4th at p. 56.) Likewise, a temporary taking is sufficient if the property is abandoned in such circumstances that the owner is unlikely to recover it. (*Ibid.*) Therefore, the instruction as given was a correct statement of the law.

There was no evidence in this case that defendants intended to take Cline's property only temporarily. Gregory cites *People v. MacArthur* (2006) 142 Cal.App.4th 275, a case in which the court of appeal reversed the defendant's judgment of conviction for receiving stolen property because the trial court gave no

instruction defining "stolen property" or "theft." (*Id.* at pp. 279-280.) The court was concerned that the jury made no determination whether the property had been taken with the intent to deprive the victim of possession for a sufficiently extended period. (*Id.* at p. 280.)

However, in that case evidence had been presented from which the jury could conclude the property had not been taken with an intent either to permanently deprive the owner of possession, or to temporarily deprive the owner of possession for such an extended period that the main value of the property was lost. The defendant was convicted when he was found to have pawned jewelry belonging to his girlfriend's mother. (*People v. MacArthur, supra*, 142 Cal.App.4th at p. 278.) There was testimony that the defendant did not think the jewelry was stolen because he believed the jewelry belonged to his girlfriend, and had seen her pawn jewelry a number of times before. (*Ibid.*) The girlfriend, too, testified that she often took jewelry from her mother's house, that she thought of the jewelry as belonging to the family, and that whenever she needed money she would pawn jewelry and then her mother would help her get it out of pawn. (*Ibid.*)

Here, by contrast, there was no testimony indicating the defendants intended merely to borrow Cline's money or other property, or to temporarily withhold it from him. Any error in giving an instruction that is not related to the evidence is harmless unless it is affirmatively shown that the instruction prejudiced the defendant, and there is a reasonable probability

that absent the error the jury would have returned a more favorable verdict. (*People v. Robinson* (1999) 72 Cal.App.4th 421, 429.) In this case, since there was no evidence that defendants intended a mere temporary taking of Cline's property, there is no danger the jury would have returned a more favorable verdict had the instruction contained the temporal element Gregory now claims was required.

B. *Lesser Included Offenses*

Gregory argues the jury should have been given a full array of instructions on lesser included offenses to first degree murder. He claims that because there was substantial evidence to support a theory that the intent to steal was lacking due to voluntary intoxication and due to evidence defendants entered the victim's home for reasons other than to commit theft, the jury should have been instructed on second degree murder, voluntary manslaughter, and involuntary manslaughter based on brandishing a weapon. The jury was instructed only on the lesser included offense of involuntary manslaughter due to unconsciousness resulting from voluntary intoxication.

1. *Second Degree Murder*

Gregory reasons he should have received a second degree murder instruction because the jury could have concluded he had no specific intent to steal due to voluntary intoxication. The specific intent to steal was requisite to a conviction for both robbery felony murder and burglary felony murder. However, voluntary intoxication would not be a defense to implied malice murder, thus the jury could have rejected a theory of felony

murder based on the lack of a specific intent to steal, yet convicted Gregory of second degree murder on the theory that shooting directly at someone or brandishing a weapon while intoxicated is sufficient evidence to establish conscious disregard for life.

We shall conclude that the trial court was not required to instruct on second degree murder because such a theory was unsupported by the evidence, and that even if such an instruction was required, any error was harmless as the factual question posed by the omitted instruction was necessarily resolved adversely under other instructions.

The trial court need not give instructions on a lesser included offense when there is no evidence that the offense was less than that charged. (*People v. Romero* (2008) 44 Cal.4th 386, 402.) This means that the evidence that the defendant was guilty of the lesser, but not the greater offense must be substantial. "'As our prior decisions explain, the existence of "*any* evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.] "Substantial evidence" in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]'" that the lesser offense, but not the greater, was committed.' [Citation.]" (*Id.* at p. 403.)

In this case there was overwhelming evidence that the defendants formed the intent to steal prior to the break in.

There was evidence Gregory was angry at the victim over a bad drug purchase. Gregory's girlfriend, Fernandez, knew that Gregory was going to Cline's house to "get the 200 bucks. . . . and . . .[t]ake whatever else he wanted." Defendants were heard discussing the plan to rob Cline, and Gregory asked for pantyhose to wear over his head. Gregory and Martin had a phone conversation in which Gregory said, "Let's go rob 'em." The three defendants, armed and wearing masks, broke into Cline's home and stole his wallet and some drugs.

Thus, although there was evidence Gregory was high from ingesting drugs prior to the break in, there was no evidence that his voluntary intoxication from the ingestion of drugs had any effect on his ability to formulate the intent to steal, as evidenced by his own comments prior to the break in. On this evidence, no reasonable juror could conclude that Gregory was guilty only of second degree murder because he lacked the specific intent to steal. Gregory's argument that implied malice murder could be based on the theory that he brandished a loaded firearm, which was an act dangerous to human life, must also be dismissed because of the overwhelming evidence of his intent to steal.

2. *Manslaughter*

Gregory's claims that the jury should have been instructed on the lesser included offenses of voluntary manslaughter and involuntary manslaughter based on brandishing a weapon, are based on the theories that he did not enter Cline's house with an intent to steal, but with the intent to assault Cline with a

deadly weapon (for voluntary manslaughter) or to brandish a firearm (for involuntary manslaughter).

While it is possible Gregory and the others had some intent in addition to robbery and burglary when they entered Cline's home, this does not diminish the overwhelming evidence of an intent to rob Cline. As such, there was no substantial evidence that would have absolved Gregory of felony murder, but not of a lesser crime. (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 818-819.)

Even if the trial court should have given instructions on lesser included offenses, such omission was harmless. Failure to instruct on lesser included offenses "is not prejudicial where 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.' [Citation.]" (*People v. Millwee* (1998) 18 Cal.4th 96, 157.)

The jury was fully instructed on the crimes of robbery and burglary, and that they required the specific intent to steal. It was instructed that it could consider evidence of defendant's voluntary intoxication in deciding whether he acted with the specific intent to commit burglary or robbery. The jury was instructed that if it had a reasonable doubt that the defendant acted with the specific intent required to commit burglary or robbery, it must find the defendant not guilty of these crimes. In spite of this instruction, the jury found defendant guilty of both burglary and robbery. Thus, the factual issue that defendant claims was erroneously omitted from the instructions,

i.e., the situation in which he had no intent to steal therefore was not guilty of robbery or burglary, was resolved in a manner adverse to him at trial.

C. *Assault Instructions*

The trial court gave CALCRIM No. 252, instructing the jury that the crimes required proof of the union of act and wrongful intent. The instruction divided the charged crimes into general intent and specific intent crimes, and instructed that as to general intent crimes, the jury must find the defendant committed the prohibited act with wrongful intent, but need not find that the defendant intended to break the law. As to specific intent crimes, the jury was instructed that the defendant must not only intentionally commit the prohibited act, but must do so with a specific intent. The court instructed that assault with a semi-automatic firearm was a general intent crime.

The trial court also gave the following instruction on the elements of assault with a semi-automatic firearm:

> "To prove that the defendant is guilty of this crime, the People must prove that:
>
> One, the defendant did an act with a semi-automatic firearm that by its nature would directly and probably result in the application of force to a person;
>
> Two, the defendant did that act willfully;
>
> Three, when the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act, by its nature, would directly and probably result in the application of force to someone;

> And four, when the defendant acted, he had the present ability to apply force with a semi-automatic firearm to a person.
>
> Someone commits an act willfully when he does it willingly or on purpose. It is not required that he intend to break the law, hurt someone else, or gain any advantage."

Gregory argues the trial court incorrectly instructed the jury in CALCRIM No. 252 that assault with a firearm is a general intent crime. Gregory's argument is based upon a use note to CALCRIM No. 252, which states that if a crime requires a specific mental state, such as knowledge or malice, the offense should be listed in the section of the instruction that sets forth the specific intent crimes.

Gregory reasons that the Supreme Court's opinion in *People v. Williams* (2001) 26 Cal.4th 779, 787-788, held that a defendant is not guilty of assault unless he or she is "aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." Since knowledge is a "specific mental state," and assault requires knowledge of certain facts, he argues the jury should have been instructed that assault with a semi-automatic firearm is a specific intent crime. He also claims the jury should have been instructed that it could consider voluntary intoxication in deciding whether he had the requisite knowledge of facts that his act (i.e., aiming and firing a loaded weapon at another person) "by its nature will probably and directly result in the application of physical force against another."

(*Id.* at p. 790.) We find no error in the instructions regarding assault with a semi-automatic firearm.

First, the crime of assault with a deadly weapon is not a specific intent crime; therefore, the trial court correctly instructed that it was a general intent crime. (*People v. Williams, supra*, 26 Cal.4th at p. 788.) Second, the trial court properly instructed as to the mental state required to find Gregory guilty of assault with a deadly weapon when it was given the elements of the crime. Specifically as to the requisite knowledge, the jury was told it must find, "when the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act, by its nature, would directly and probably result in the application of force to someone."

Third, the distinction between a general and specific intent crime is applicable only to a defense of voluntary intoxication or mental disease, defect or disorder. (*People v. Williams, supra*, 26 Cal.4th at p. 785.) There is no issue in this case of mental disease, defect, or disorder, and juries may not consider evidence of a defendant's voluntary intoxication in determining whether or not he or she committed assault. (*Id.* at p. 788.)

Finally, the issue of voluntary intoxication as it applies to a defendant's knowledge of facts that bear on intention is directly addressed by statute. "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the

capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act." (§ 22, subd. (a).) Accordingly, the trial court did not err in instructing the jury that assault was a general intent crime, or that voluntary intoxication was not a defense to assault.

D. *Effective Assistance of Counsel*

Gregory argues he received ineffective assistance of counsel in four respects. First, he claims his trial counsel argued an unrecognized theory of defense in closing argument. Second, his trial counsel did not sufficiently emphasize his voluntary intoxication defense with respect to his intent to steal. Third, his attorney did not argue voluntary intoxication as a defense to the charge of assault. Finally, his trial counsel should not have argued the victim knowingly assumed the risk of violence when he made the decision to become a drug dealer.

"In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.' [Citations.] Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.'

[Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]" (*People v. Ledesma* 2006) 39 Cal.4th 641, 745-746.)

1. *Criticism of Felony Murder Rule*

Gregory claims his trial attorney's closing argument improperly criticized the felony murder rule. Citing *People v. Diggs* (1986) 177 Cal.App.3d 958, 970, he argues that trial counsel's pointless attack on the law was in essence a tacit concession of guilt. In *People v. Diggs*, *supra*, this court held that the defendant's trial counsel was incompetent where he ignored a lawful defense and instead argued a legally unrecognized theory, depriving the defendant of a potentially meritorious defense and effectively conceding the defendant's guilt. (*Ibid.*)

Here, however, Gregory's trial counsel did not ignore a lawful defense, thus he did not deprive Gregory of a meritorious defense, and did not effectively concede guilt. Gregory's counsel argued that the jury received no instructions on premeditation because it was conceded Gregory was too

intoxicated to form the specific intent necessary to find him guilty of murder. Counsel then launched into a criticism of the felony murder rule, and concluded by arguing that if Gregory was so intoxicated that he could not form the requisite mental state for murder, the jury could not find that he formed the specific intent required to commit burglary or robbery.

Thus, far from ignoring a meritorious defense and focusing solely on an unrecognized defense, counsel's criticism of the felony murder rule was part and parcel of his meritorious defense of voluntary intoxication. For this reason, the argument did not constitute ineffective assistance of counsel.

2. *Intoxication Defense to Robbery and Burglary*

Likewise, we conclude trial counsel sufficiently emphasized the voluntary intoxication defense to robbery and burglary, and therefore to felony murder. His argument was that if he was incapable of forming the mental state required for murder (as he claimed the prosecution conceded), he was also incapable of forming the mental state for robbery or burglary, which was necessary to find Gregory guilty of felony murder.[3]

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[3] Defense counsel argued, in pertinent part: "And I submit to you that if you're so brain-fried that you can't form the mental state of malice aforethought to commit murder, you also cannot form the specific mental intent required to commit burglary or robbery. [¶] Both of those crimes require knowing more than just you['re] making a certain physical action. They require you to know what you're doing, that it's something that's wrong, that you intend to steal, that you intend to use force to obtain property, or whatever it might be. [¶] For burglary, you have to, when you enter a building or a structure, you have to know that you're doing so for the purpose of either committing theft

3. *Intoxication Defense to Assault*

As for Gregory's argument that his trial counsel was ineffective for failing to argue voluntary intoxication was a defense to the charge of assault with a semi-automatic firearm, we concluded, *ante*, that voluntary intoxication is no defense to the crime of assault. Moreover, the only facts of which Gregory must have been aware in order to establish that his act by its nature would directly, naturally, and probably result in a battery were that he was shooting a semi-automatic firearm at another person. Given Gregory's actions before and during the crime, and statements of intent before the crime, he undoubtedly had the requisite knowledge. Such an argument would have had no merit, and counsel was not ineffective for failing to make it.

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or some other felony once you're inside. And again, if your brain is made of scrambled eggs because you're very high on this poison that Mr. Cline liked to sell, and you don't have your judgment, you don't have your understanding that you would have if you weren't in that condition, you can't form that state of mind, that specific intent. [¶] If what you are is a drug-soaked zombie carrying around . . . a gun . . . you're in a state of unconsciousness. And that word has special meaning in the law that's not the same as the common English meaning. . . . Vincent Gregory was unconscious when these events occurred. That, however, does not mean that he just goes home and gets off without any responsibility because he, too, made the choice, and that was the choice to use the drugs. . . . [¶] But for the purposes of the criminal law, acting with that state of mind and doing something that results in death, again, you know, not even intending the death, something that -- just because you're acting like an idiot, something happens and someone ends up dead, that's called involuntary manslaughter. . . . That's what Mr. Gregory is responsible for under the evidence in this case."

4. *Prejudicial Argument*

Finally, Gregory argues his trial counsel was ineffective for arguing that the victim assumed the risk of violence because such an argument may have infuriated the jury and prejudiced it against him.

Gregory, who was 18 years old at the time of the offense, was on trial for killing his drug dealer, the killing motivated by a bad drug deal. Gregory's trial counsel tried to paint him in the most sympathetic light possible. In response to the prosecutor's argument that the law protected Cline regardless of his lifestyle, and that he needed the protection of the law the most because of his lifestyle choices, Gregory's counsel argued that the law should owe its highest protection not to drug dealers, but to children whose lives are destroyed by drug addiction. He argued that methamphetamine was addictive, and could be seen "in the face of Vincent Gregory, a young man who's on trial here because he was raised by a street father who was there because his real parents, for whatever reason, just didn't have the time to deal with him."

He argued that Cline had made a conscious decision to make money by selling poison, and that when a dispute arose over the sale of it, he assumed the risk that the dispute would be settled by violence. He argued, "There's a saying in the Old Testament, 'Sew the wind, reap the whirlwind.' Well, that's what happened to Doug Cline, and I don't feel terribly sorry for him. I certainly feel sorry for members of his family, some of whom have been attending these proceedings who have to deal with

this wreckage. I don't feel terribly sorry for him because he made his choice, and he reaped the whirlwind that came from the choice that he made."

We will not reverse the judgment for ineffective assistance of counsel because this was a trial tactic, the reason for which does not appear on the record, and because Gregory has not met his burden of showing that he suffered any prejudice.

"'The decision of how to argue to the jury after the presentation of evidence is inherently tactical' (*People v. Freeman, supra,* 8 Cal.4th at p. 498), and there is a 'strong presumption' that counsel's actions were sound trial strategy under the circumstances prevailing at trial. (*Ibid.*)" (*People v. Samayoa* (1997) 15 Cal.4th 795, 856.) Tactical errors are not usually reversible, and where the strategic reasons for counsel's actions do not appear on the record, we will not find ineffective assistance of counsel unless there could be no conceivable reason for the actions. (*People v. Garvin* (2003) 110 Cal.App.4th 484, 490.)

Here the evidence against Gregory was overwhelming. It included damaging physical evidence, as well as admissions from Gregory and his friends. Defense counsel tried his best to paint Gregory in a sympathetic light at the expense of the victim. We cannot say this decision constituted ineffective assistance of counsel.

Also, because of the overwhelming evidence against him, Gregory has failed to meet his burden of showing it was reasonably probable that but for counsel's action he would have

received a more favorable verdict. (*People v. Ledesma, supra*, 39 Cal.4th at pp. 745-746.)

E. *No Prosecutorial Misconduct*

Gregory argues that the prosecutor made three improper arguments in closing. In the first two instances, Gregory argues the prosecutor undermined his right to a jury trial by equating the jurors to judicial officers and telling them their feelings should not enter into their decisions. In the third instance, Gregory argues the prosecutor appealed to the jury's passions and prejudices by playing on the fear that addicts will be allowed to commit crimes.

As a preliminary matter, Gregory forfeited his claims of prosecutorial misconduct by failing to raise a timely objection. "It is, of course, the general rule that a defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Jones* (2003) 29 Cal.4th 1229, 1262.) Gregory made no objection to the arguments to which he now objects; therefore, the claims of prosecutorial misconduct have been forfeited. We nevertheless reach the merits of his claims because he asserts his trial counsel's ineffectiveness for having failed to object.

1. *Equating Jurors to Judicial Officers*

The prosecutor began his closing argument by stressing the importance of following the court's instructions. He said in pertinent part:

> "When you became jurors, one of the things you swore to do was to uphold the law. You are now functioning officers of the judicial branch. . . . [¶] What that means, just as if you were in the Army, gotta follow the rules, and the rules are as Her Honor is going to give them to you. You are now judicial officers. She is the judge of the law. She is the final person who tells you what the law is. You must follow that law.
>
> But you twelve . . . are now basically judges of the facts. It has been said that just as the judge has the right to wear a robe as the finder of the law, jurors might be said to be wearing robes, figuratively speaking, in your findings as well, because you are now judicial officers. You have to determine what the facts are. You are the sole exclusive judges of those facts."

Gregory argues the prosecutor engaged in misconduct because he "urge[d] jurors to think of themselves as government officials . . . ." He claims a jury is not an agency of the government, but a buffer between the government and the accused. He argues that "[i]f jurors are convinced that they serve as government officials rather than as citizens, then the defendant does not receive a trial by a jury of his peers, but a trial by a jury of *ad hoc* government officials."

The Supreme Court has described the standards regarding prosecutorial misconduct as follows:

> "'"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law

> only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.] . . . Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa, supra,* 15 Cal.4th at p. 841.)

The prosecutor's argument that the jury would act as judicial officers and judges of the facts was neither egregious conduct, nor a deceptive or reprehensible method of persuading the jury. Judges are objective, unbiased arbiters of the law. Telling jurors that they are to act as judges of the facts is another way of impressing upon them their duty to be impartial and to follow the law as given to them. Such argument did not amount to misconduct.

2. *Argument Regarding Jurors' Feelings*

During defense counsel's closing argument, he told the jury he did not like the reasonable doubt instruction because, "it doesn't tell you how you would feel if you have one of these reasonable doubts." He also asked the jury, "to decide this case as you would want someone to decide a case in a similar nature were it your son on trial."

In response, the prosecutor argued that defense counsel's statements were designed to appeal to the jury's passions and prejudices. Specifically, he responded:

> "Counsel argues with regard to the instruction of beyond a reasonable doubt. What I don't like about it is that it doesn't talk about how you would feel.

Well, there's nothing in that instruction about how you feel. There's a reason for that. There's nothing in there about deciding this case as if your son was on trial, which counsel also argues to you. And there's a reason for that, too.

If your son, if anybody close to you was charged with a crime, and you were called as a juror in that case, you would be excused. Why? Not because you're an unfair person, but because the law realizes that at that point it's too close. It is too close. You can no longer be objective within the meaning of the law if it's that close. . . .

And what counsel is essentially trying to do by incorporating this 'use your son' into this is to incorporate a higher level for beyond a reasonable doubt as it exists in the law. He's trying to take that level, which is high enough as it is, and scotch it up just a little bit higher. . . .

Now, it's not just what the law says, it's the law plus how does it make you feel. It's the law plus imagine your son. Well, there is no such additional element in that definition.

And you got to bear in mind, too, with regard to the argument about how it would make you feel, this is not gonna be a pleasant business. For those of you who have not been through jury duty before, this is hard. This is hard. It is unpleasant to have to get together with eleven other people and to decide the guilt or innocence of any human being of a crime this serious. Okay. That is a weighty responsibility. Nobody likes to do it. Nobody likes to come back and say at the end of the day, that man's guilty of murder in the first degree. Nobody is going to want to do that in the sense of your feelings on the subject."

Gregory argues the prosecution "attempted to dehumanize [the jury] by telling them that [the] reasonable doubt instruction did not permit jurors to consider how they feel." He argues jurors must properly consult their feelings because proof beyond a reasonable doubt requires a "subjective state of near certitude . . . ."

The prosecutor's argument was not misconduct. Defense counsel had argued that the jurors should decide the case as if it were their son on trial. The prosecutor's argument merely informed the jury that: (1) the reasonable doubt standard did not allow them to be biased, as they would be if their son were on trial, and (2) if the evidence warranted conviction, their duty was to convict even if it was unpleasant. The prosecutor did not argue, as defendant suggests, that the jurors were to ignore the subjective state of certitude implicit in the reasonable doubt instruction.

3. *Appeal to Jury's Passions and Prejudices*

Gregory presented the testimony of a criminalist that his blood contained 0.22 milligrams per liter of methamphetamine, that this concentration was 10 times higher than a therapeutic level, and that this concentration was typical for an abuser. From this evidence, Gregory's trial counsel argued that he was so intoxicated that he was unable to form the specific intent required for burglary or robbery.

In response, the prosecutor argued there was no evidence that the level of methamphetamine in Gregory's blood would render a person incapable of forming the specific intent

required to commit a crime, and that since Gregory's levels were normal abuse levels, his argument meant that no methamphetamine abuser could ever be responsible for committing a specific intent crime. He argued:

> "Counsel argues that Mr. Gregory was at a point two two in terms of his methamphetamine level, ten times the therapeutic user of methamphetamine, as if somehow this proved something. It's a little bit like arguing that because somebody had ten times the amount of alcohol in their system that you might find after a dose of NyQuil that they must have been blotto on alcohol. There is simply no connection here.
>
> There is no evidence, expert [or] otherwise, indicating that ten times the therapeutic level of methamphetamine means that the person could not formulate the specific intent required to commit a crime. In fact, as you may recall, the expert testified this is pretty normal for the levels you'd see. If you were to follow Mr. Smith's argument to the next level, it means that the standard level of methamphetamine that you find in felons in Sacramento County means that none of these people is responsible for any specific intent crime. None of them. That's a staggering thing to say. Staggering."

Gregory claims that it was misconduct for the prosecutor to make comments calculated to arouse passion or prejudice, and that it was misconduct to suggest that acceptance of the voluntary intoxication defense would lead to lawlessness in Sacramento County. Gregory argues the prosecutor appealed to the passions or prejudices of the jury by playing on the fear that addicts will be permitted to commit crimes if a voluntary

intoxication defense is allowed. He also argues this was inviting jurors to nullify the law of voluntary intoxication and misstating the evidence. We disagree.

The prosecutor's comments do not appear to have been calculated to arouse the passion or prejudice of the jury, or to nullify the voluntary intoxication defense. Instead, a reasonable juror would understand that the prosecutor was pointing out the lack of evidence to support Gregory's claim of voluntary intoxication because there was nothing to connect the level of methamphetamine in his blood with an inability to form the specific intent required for burglary or robbery. The prosecutor was also arguing that without this key piece of evidence, the jury could not conclude Gregory lacked the specific intent, and that without such evidence, no drug abuser would ever be convicted of a specific intent crime.

A prosecutor is given wide latitude in closing argument, and may make vigorous argument if it amounts to fair comment on the evidence. (*People v. Brown* (2004) 33 Cal.4th 382, 399.) The prosecutor's arguments were fair comments on the evidence, and not for the improper purposes Gregory claims.

F. *Gang Evidence*

Gregory argues the trial court abused its discretion by allowing gang evidence for the purpose of explaining a witness's reluctance to testify. We review a trial court's ruling to admit evidence offered for impeachment for abuse of discretion. The trial court's ruling will be upheld "unless the trial court 'exercised its discretion in an arbitrary, capricious, or

patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Ledesma, supra,* 39 Cal.4th at p. 705.) We shall conclude there was no possible prejudice arising from the court's ruling because there was no testimony that Gregory was a gang member.

The prosecutor moved in limine to admit evidence of the gang affiliation of the defendants or other witnesses for the purpose of explaining the reluctance of some witnesses to testify. The trial court granted the motion for the limited purpose of showing the effect of intimidation on the witness. In the prosecutor's opening statement, the jury was told:

> "Some of the things that you're gonna hear about with respect to the players in this case are that many of them are associated with, friends with, members of, a group called the Sacramaniacs. Okay. And you'll come to find out through the course of this trial that that's a group or a gang, whatever you want to call it, of individuals that espouse racist views. For whatever reason, they believe in their warped little minds that their race is superior to anybody else's.
>
> What's important for your consideration, that information will come to you so that you can understand why people are afraid to testify in this case. You're gonna hear from a number of people that they don't want to come in here. They would rather not be here. They have received threats. Many of them will tell you that they believe they have contracts out on their life because they have cooperated with law enforcement. They have heard through the grapevine that there's hits out on them, because in the world of the Sacramaniacs and this group of individuals, the last thing that you ever do

> is become a snitch or a rat or tell anything that you know to law enforcement."

During Harris's testimony, he stated that he was associated with the Sacramaniacs for about 14 years. He considered himself an OG, i.e., an original gangster. He testified that neither Cline nor Robison were gang members. Gregory points to no evidence that he or the other two defendants were members of a gang. The prosecutor's opening statement did not assert that Gregory or his co-defendants were gang members, only that many of the "players" in the case were members of or associated with the Sacramaniacs. Even if we were to conclude that the trial court abused its discretion in allowing the evidence, which we do not conclude, there is no prejudice to Gregory, who was never named or implicated as a gang member.

G. *Defendant's Right to Counsel and to be Present*

Gregory claims the trial court deprived him of his state and federal constitutional rights to be personally present and represented by counsel at certain critical stages of the proceedings. We conclude he has forfeited these arguments by failing to object below.

Gregory's arguments focus on two instances in which the trial court issued rulings regarding the admission of evidence. In the first instance, the parties, including Gregory, had already argued the motion in limine to admit the evidence, and the challenged action relates only to the trial court's issuance of the ruling in the absence of Gregory and his attorney after having taken the matter under submission. In the second

instance, the trial court ruled on the admission of impeachment evidence against Gregory and other witnesses, after stating on the record that Gregory's counsel had indicated his agreement to have the court go forward in their absence.

As previously set forth, the prosecution made a motion in limine to admit evidence of the gang affiliations of defendants or other witnesses. Both Gregory and his trial counsel were present at the hearing on the motion and Gregory's attorney argued against admission of the evidence. The trial court took the matter under submission.

Several days later, the trial court announced its ruling granting admission of the gang evidence. Neither Gregory nor his attorney was present. However, both were present the next day the court was in session, and raised no objection to the ruling in their absence. The prosecutor later mentioned the gang evidence in her opening statement, and Harris testified regarding his gang involvement. Gregory did not object on either occasion.

A few days after ruling on the gang evidence, the trial court addressed the matter of impeachment evidence as to several witnesses. Only defendant Mason, his attorney, and the prosecutor were present. The trial court noted that there had been conversations in chambers, and that Gregory's counsel had agreed to stipulate to the admission of his misdemeanor conviction and to allow the hearing to go forward in his absence. The trial court then issued rulings on the

admissibility of impeachment evidence on the witnesses, as well as the admissibility of Gregory's prior misdemeanor conviction.

When Gregory's counsel was next present, the trial court informed counsel for defendants of additional rulings regarding impeachment evidence. Again, Gregory offered no objections.

"'"[A]s a general rule, 'the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights. [Citations.]"' (*People v. Kennedy* (2005) 36 Cal.4th 595, 612 [31 Cal.Rptr.3d 160, 115 P.3d 472].) The reason for this rule is to allow errors to be corrected by the trial court and to prevent gamesmanship by the defense. [Citations.]" (*People v. Romero, supra,* 44 Cal.4th at p. 411.)

Gregory forfeited his arguments that he suffered a violation of his right to be present and to the assistance of counsel by failing to raise these arguments at trial. (*People v. Rogers* (2006) 39 Cal.4th 826, 856; *People v. Abbott* (1956) 47 Cal.2d 362, 372; *People v. Santos* (2007) 147 Cal.App.4th 965, 972.)

H. *Imposition of Upper Term*

The trial court imposed the upper term on Count Two, assault with a firearm, as well as the upper term for the firearm use enhancement connected with that offense. The reasons cited for the upper term on Count Two were: (1) defendant engaged in violent conduct indicating a serious danger

to society, (2) defendant used a weapon, (3) defendant was on probation at the time of the offense, and (4) defendant's prior performance on probation was unsatisfactory. The reasons cited for the upper term of the enhancement were: (1) defendant occupied a position of leadership, and (2) the manner in which the crime was carried out indicated planning.

Gregory argues the imposition of the upper terms violated *Apprendi/Blakely/Cunningham*[4] because the court, rather than the jury, made the finding of fact justifying the imposition of the upper terms. However, Gregory was sentenced on March 7, 2008, after California law was amended effective March 30, 2007, to give the trial court discretion in imposing the upper, middle, or lower term. (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992.) Because the middle term is no longer the presumptive term absent aggravating or mitigating facts, imposition of the upper term by the trial court without any finding of aggravating circumstances by the jury no longer violates a defendant's right to trial by jury. (*Id.* at p. 991.)

Gregory also argues his trial counsel was ineffective for failing to object to two of the circumstances in aggravation -- that Gregory engaged in violent conduct and used a weapon in the course of the offense. Gregory claims these circumstances were invalid sentencing factors because the first was an element of

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[4] *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435]; *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403]; *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856].

the offense, and the second was precluded by the imposition of the weapon use enhancement.

Gregory cannot prevail on a claim of ineffective assistance of counsel because he cannot establish prejudice. The trial court is vested with broad discretion in weighing the aggravating and mitigating factors, and a single factor in aggravation will support imposition of the upper term. (*People v. Black* (2007) 41 Cal.4th 799, 813; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) We will affirm unless the sentence choice was clearly arbitrary or irrational. (*People v. Avalos, supra,* at p. 1582.) Here the trial court identified two other aggravating factors, and Gregory cannot show a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (*In re Harris* (1993) 5 Cal.4th 813, 833.)

I. *Restitution Order*

The trial court ordered Gregory to pay $18,237.48 in direct restitution to Cline's family. This amount included expenses related to mileage and lost wages for Cline's family to attend the trial. It is unclear exactly what portion of the restitution amount is related to the trial, but at least $4,205.73 is related to expenditures for the trial.[5]

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[5] Some of the amounts are stated simply as mileage or lost wages. The probation report does not specify whether these amounts were expended solely for the trial, for the funeral and related activities, or for both.

Gregory argues this direct restitution payment is a form of penalty, and that as such the amounts to compensate the victims for expenses incurred in attending the trial is an unconstitutional penalty for exercising his constitutional right to a jury trial.

We reject this argument because direct victim restitution is not a punishment or form of penalty. In *People v. Harvest* (2000) 84 Cal.App.4th 641, 650 (*Harvest*), the court held that direct victim restitution payments do not violate the constitutional ban against double jeopardy because they do not constitute a criminal punishment. Gregory attempts to discount the holding in *Harvest* because he claims the opinion "placed particular reliance on the portion of the statute which states that an order 'shall be enforceable as a civil judgment.'[,]" but the statute in question, section 1202.4, subdivision (i) now states that a restitution order "shall be enforceable as if the order were a civil judgment."

While it is true that *Harvest, supra*, noted in its analysis that a restitution order would be "enforceable as a civil judgment[,]" this recognition related to the fact that the enforcement of the order might occur outside the context of criminal law, not to the assumption that the language of the statute meant the order was a civil judgment. (84 Cal.App.4th at p. 647.) The change in the statutory language had no effect on the methods of enforcement.

Moreover, this consideration was not crucial to the court's determination that victim restitution orders did not constitute

a criminal punishment. In fact, the court considered a number of factors, including that victim restitution orders are not an inevitable product of a criminal sentencing because they require a victim, that restitution orders are paid to the victim, that there is no limit or fixed amount for such orders, that the primary purpose of restitution orders is to provide monetary compensation to the individual or individuals injured by the crime, that such orders do not involve an affirmative disability or restraint, that such orders have not historically been regarded as punishment, and that they do not necessarily require a finding of scienter. (*Harvest, supra*, 84 Cal.App.4th at pp. 649-650.) This court has indicated its agreement with *Harvest*. (*People v. Kunitz* (2004) 122 Cal.App.4th 652, 657.)

Accordingly, the victim restitution order did not constitute a criminal punishment, and was therefore not an unconstitutional penalty for exercising the right to trial.

J. *Fines Properly Imposed*

After articulating Gregory's prison sentence, the trial court specified the restitution fines and restitution order, then stated: "The additional fines and fees listed in the probation report are also ordered." The probation report, in turn recommended the following:

> "5. Defendant pay a court security surcharge fee, per conviction, pursuant to Penal Code Section 1465.8(a)(1) in the amount of $80.00, payable through the Court's installment process;
>
> 6. Defendant pay a $208.43 main jail booking fee pursuant to Section 29550.2 of

> the Government Code, payable through the Court's installments process;
>
> 7. Defendant pay a $24.09 main jail classification fee pursuant to Section 29550.2 of the Government Code, payable through the Court's installments process."

The abstract of judgment correctly listed these fees and their authorizing statutes. Gregory claims the trial court's "attempt to incorporate the probation report by reference did not satisfy the law requiring an oral pronouncement of judgment." He asserts that without a detailed pronouncement of the fees, he was not informed exactly what his sentence was to be. We disagree.

The trial court incorporated the terms of the probation report as it regarded fees. Defendant must be provided a copy of the report prior to sentencing. (§ 1203, subd. (b)(2)(E); *People v. Scott* (1994) 9 Cal.4th 331, 350-351.) Gregory does not claim that he was unaware of the terms of the probation report. Accordingly, the trial court's incorporation of the terms of the probation report regarding fees adequately informed Gregory of the amount of and authority for the fees imposed, and constituted an oral pronouncement of such fees.

The abstract of judgment correctly identified the reasons for, amount of, and authority for each fee. Thus, this is not a situation like *People v. High* (2004) 119 Cal.App.4th 1192, where the abstract of judgment was incorrect. In that case, this court stressed the importance of setting forth the fees and fines in the abstract of judgment. "If the abstract does not specify the amount of each fine, the Department of Corrections

cannot fulfill its statutory duty to collect and forward deductions from prisoner wages to the appropriate agency. [Citation.] At a minimum, the inclusion of all fines and fees in the abstract may assist state and local agencies in their collection efforts. (Pen. Code, § 1205, subd. (c).)" (*Id.* at p. 1200.)

The abstract here suffers no such deficiency. There was no error.

K. *Actual Time Credit*

Gregory argues the trial court erroneously failed to award him presentence custody credit for 801 actual days served. Section 2900.5 provides that a defendant shall be credited for time served in all felony and misdemeanor convictions. The People concede that Gregory is entitled to 801 days of actual presentence custody credit. We recognize that Gregory has preserved this argument should his conviction be overturned by another court. Otherwise, it is a waste of judicial resources for this court to consider the argument, since Gregory was sentenced to life without the possibility of parole.[6]

L. *Parole Revocation Fine Correctly Imposed*

The trial court imposed a $10,000 parole revocation fine and suspended its payment unless parole was revoked. Gregory

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[6] The recent amendments to Penal Code section 4019 do not operate to modify any of the defendants' entitlement to credit, as they were committed for a serious felony. (Pen. Code, § 4019, subds. (b), (c); Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.)

argued in his opening brief that the fine was unauthorized because he was sentenced to life in prison without the possibility of parole. However, he concedes in his reply brief that in light of the Supreme Court's holding in *People v. Brasure* (2008) 42 Cal.4th 1037, 1075, the fine was appropriate. *People v. Brasure, supra*, held that where a defendant is subject to a prison term that includes a period of parole in addition to a sentence of life without the possibility of parole, the fine is required by statute. (*Ibid.*) Gregory was sentenced to a term of 25 years to life for the firearm enhancement, as well as a nine year sentence for the assault and a 10 year sentence for the firearm enhancement to the assault. The trial court properly imposed the parole revocation fine in this case.

II

Mason's Appeal

A. *Evidence Properly Admitted*

Mason argues the trial court improperly admitted certain evidence, and that such error denied his right to a fair trial. We shall examine his evidentiary claims separately.

1. *Personal Knowledge of Nicole Fernandez and Jessica Marsh*.

Mason argues the trial court improperly admitted statements Fernandez and Marsh made to the police because the statements were not based upon their personal knowledge. We disagree.

Gregory's girlfriend, Fernandez, was interviewed by police. A redacted portion of the interview was transcribed and admitted into evidence. The substance of the interview to which Mason

objects is that portion in which Fernandez indicated she knew prior to the murder that Gregory and Mason were planning to commit a robbery. The detective asked Fernandez what she heard Gregory and Mason talking about before they left her at Reed's apartment. She replied, "Collecting, um, 200 bucks from somebody that had rip -- um, ripped 'em off, that owed 'em 200 bucks. And he said, you know, um, he'd pay it, give it to him."

Fernandez clarified that Mason and Gregory discussed "the $200 thing," when the two returned from going to the store, but before they left her at Reed's apartment. The jury learned from other testimony that during the time when Mason and Gregory told Fernandez they were going to the store, they in fact went to Cline's house to demand the money back for the bad drugs.

Fernandez told the detective that she thought her car had been used in "[r]obbing somebody 'cause they didn't want to give him 200 buck -- or he -- they -- he said that he was, you know, gonna give 'em back what he ripped him off of, of 200 bucks and um, yeah." She did not know who they were going to rob. Fernandez indicated Mason was the one encouraging Gregory to "do stupid stuff . . . like stupid shit that's gonna get him arrested." She said that Gregory "wouldn't be worried about the 200 bucks and then Stanley would, you know, bring it up or something, make him worry about it again."

The detective asked Fernandez what Gregory told her about why he was going to Cline's house. She said, "I don't know. He really didn't tell me any reason. He just told me he was gonna go to Doug's -- or I -- he didn't even -- I don't know what he

told me. I knew what was -- I knew what -- that -- I thought they were just -- . . . I -- just I think to rob him, I think only." She said that if they talked about killing Cline she "was not listening or something." When asked if she knew they were going to Cline's to rob him she answered, "Or -- yeah, well, get the 200 bucks. . . . And probably, yeah. . . . Take whatever else he wanted."

Mason claims no jury could have reasonably found that Fernandez had personal knowledge that he and Gregory formed a plan to rob Cline, and that she repeatedly stated she lacked personal knowledge of such a plan. We disagree.

A witness cannot competently testify to matters of which she has no personal knowledge. (Evid. Code, § 702.) "Personal knowledge means a present recollection of an impression derived from the exercise of the witness's own senses." (*Alvarez v. State of California* (1999) 79 Cal.App.4th 720, 731, abrogated on other grounds in *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63.) A trial court should allow the witness's testimony unless "'no jury could reasonably find that [she] has such [personal] knowledge.' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 356.)

However, a witness's uncertainty of the events does not preclude the admission of the witness's testimony. (*People v. Lewis, supra*, 26 Cal.4th at p. 357.) Mason assumes that Fernandez's numerous protestations that she did not know what had happened meant she had no personal knowledge of a plan. However, Fernandez's testimony contains indications that she had

personal knowledge of the discussions regarding a plan to rob Cline because she heard Gregory and Mason talking.

For example, when the detective asked who Gregory and Mason were planning to rob, Fernandez answered, "He [Gregory] didn't get to that. Every time I got close enough to that answer last night, ..." The detective asked, "But you're talking you're talking to Vince?" Fernandez answered, "Yeah." Thus, even though Fernandez did not know who was to be robbed, she knew of the plan from what Gregory told her.

Later the detective asked Fernandez again if Gregory told her they were going to go get the money back, and she answered, "yeah." She said at first that Gregory did not tell her why they were going to go to Cline's, then when asked again, said, "just I think to rob him, I think only." Again, it is apparent that Fernandez knew about the plan to rob Cline because she heard Gregory and Mason discussing it, or because Gregory told her about it. She had personal knowledge of the statements to which she testified because she heard the statements. The trial court did not err in admitting her statement.

Mason also claims that the trial court should have excluded Jessica Marsh's statement to police that she saw Mason with a gun. He claims Marsh did not have personal knowledge of the gun. Again, Mason confuses the witness's personal knowledge with her certainty.

Marsh told the detective that she thought Mason had a gun because he normally had one on him and because he acted like he

had one on him. The detective asked her if she actually saw a gun. She responded:

> "Um, I -- I can honestly say that I saw a little bit of a black, you know, handle of something. I don't know. I mean I'm not trying to stare at him, but I don't like guns. . . . So yeah, I -- I was looking through -- enough to see maybe if he did have a gun, because I'm -- I'm scared . . . . Yeah. Like -- like he had a leather jacket, and he like unzipped it to the belt right here. And then he's all like adjusting that thing and . . . playing with his -- whatever was in his pants. . . . it probably was a gun. . . . I saw -- yeah, I saw a black -- and I know what a gun looks like, so yeah, he probably did -- I mean yeah, he probably . . . . But who knows? It could've been a -- a BB gun. Who knows? . . . It could've been two guns; you know what I mean? But I mean you could tell that it was a gun. But -- I mean I've seen Stan have fucking -- a gun that looked real but it wasn't; you know what I mean?"

Marsh's statement makes it apparent that she actually saw something that looked like a gun. She admits it could have been a BB gun or a toy gun. This was for the jury to decide. Her uncertainty about the type of gun did not make her testimony inadmissible.

2. *Prior Inconsistent Statement of Amanda Miller*

In Miller's videotaped statement to police, she stated that Gregory had a gun, and that he asked her for pantyhose to put over his face. At trial, she claimed to remember nothing about the night in question, presumably because of her heavy drug use. Mason argues the trial court should not have admitted her prior statement pursuant to Evidence Code section 1235 because there

was no reasonable basis for concluding that her loss of memory was the result of her being evasive or untruthful.[7]

"Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, courts do not apply this rule mechanically. 'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness.' [Citation.] When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.)

Here, the trial court was reasonably justified in concluding Miller's failure to remember was feigned, despite her claim that her total lack of recall was due to her excessive drug use. First, there was evidence of bias when she testified that co-defendant Martin was "family" and that she had known him for a long time. Second, although there was no evidence that any of the defendants were gang members, there was evidence they were close to gang members, and at least one witness was afraid

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[7] Evidence Code section 1235 provides an exception to the hearsay rule for a statement that is "inconsistent with [the witness's] testimony at the hearing and is offered in compliance with Section 770."

to testify because she did not want to "mess with these people I'd be messing with[.]" Thus, even though Miller claimed she had not been threatened, there was sufficient evidence from which the trial court could reasonably conclude that she had reasons to feign lack of memory. Admission of her prior statements was therefore proper.

3. *Admission of Zip Ties*

When Martin was arrested, he was found with a red backpack. Inside the backpack were 11 zip ties. Officers found more zip ties in the home where Mason was arrested. Some were in the living room of the home, and some were in the bedroom occupied by Mason. There were 18 in all. None of the zip ties found in relation to Martin or Mason matched the zip ties found on Cline's body. In all, there were six different types of zip ties.

Mason objected to the introduction of the zip tie evidence, claiming it was irrelevant and speculative. The prosecutor argued the ties were relevant because of the large number of ties found. The trial court allowed the evidence. The jury was informed of the discovery of the zip ties, as well as the fact that they did not match the ties found on the victim.

Mason argues the zip ties were irrelevant because there was no evidence that he or the other two defendants owned the zip ties, and no evidence to tie them to the crime scene. We disagree.

The trial court has broad discretion to determine the relevance of evidence. (*People v. Hamilton* (2009) 45 Cal.4th

863, 913.) The fact that a relatively large number of zip ties was found in close proximity to Mason and Martin when arrested leads to a reasonable inference that each was carrying an array of zip ties at the time of the murder. This was relevant because the victim was restrained with zip ties. Furthermore, there could be no possible prejudice because the jury was informed that the zip ties found in connection with the defendants did not match the zip ties found on Cline's body, and was informed that Mason's housemate had claimed ownership of the zip ties found in the residence where Mason was arrested.

B. *Substantial Evidence Supports Special Circumstance*

Section 190.2, subdivision (d) provides that every person found guilty of murder in the first degree who "with reckless indifference to human life and as a major participant," aided abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of certain felonies which resulted in the death of some person or persons "shall be punished by death or imprisonment in the state prison for life without the possibility of parole" if the murder was committed while the defendant was engaged in, or was an accomplice in the commission or attempted commission, or the immediate flight after committing the felony. Mason argues there was insufficient evidence he acted "with reckless indifference to human life" as required to support the special circumstance finding against him. We disagree.

"'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record,

a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

"Reckless indifference to human life" means that the defendant "'knowingly engag[es] in criminal activities known to carry a grave risk of death' . . . . [Citation][.]" (*People v. Estrada* (1995) 11 Cal.4th 568, 577.) There was ample evidence of reckless indifference to human life on this record. Mason was involved in planning the robbery. Fernandez said Mason was making Gregory want to do "stupid stuff" that would "get him arrested." Davison overheard all three defendants discussing a plan to rob Cline. Mason was aware Gregory was armed, because Gregory was waving around a handgun when they were at Lindeman's apartment. There was also evidence from Marsh's testimony that Mason may have been armed with a gun.

Breaking into a drug dealer's home in the early morning hours with the intent to rob him, and knowing that a companion is armed with a firearm, demonstrates a knowing engagement in criminal activity that carries a grave risk of death. This evidence was sufficient to infer a reckless indifference to human life.

C. *Actual Time Credit*

The trial court failed to award any presentence custody credits. Section 2900.5 provides that a defendant shall be

credited for time served in all felony and misdemeanor convictions. The People concede that Mason is entitled to 808 days of actual presentence custody credit. We recognize that Mason has preserved this argument should his conviction be overturned by another court. Otherwise, it is a waste of judicial resources for this court to consider the argument, since Mason was sentenced to life without the possibility of parole.

D. *Parole Revocation Fine*

Mason argues the trial court erred when it imposed a $10,000 parole revocation fine pursuant to section 1202.45. The People concede the error. However, as previously stated, the Supreme Court held in *People v. Brasure, supra*, 42 Cal.4th 1075, that fine is required by statute where a defendant is subject to a prison term that includes a period of parole in addition to a life sentence without the possibility of parole. Mason was sentenced to a nine year determinate term for assault with a firearm in addition to the indeterminate term. Thus, the trial court properly imposed the parole revocation fine.

III

Martin's Appeal

A. *Gregory's Statement Properly Admitted*

On the day Cline was killed, Harris received a telephone call from Gregory sometime between 6:00 and 9:00 a.m. Gregory was at Harris's house, and was crying and distraught. Harris told Gregory to stay where he was, and that Harris would come to

him. When Harris got home, he found Gregory in possession of a handgun. Gregory was not sober. He was crying and fidgety.

Gregory made a statement to Harris that was the subject of a motion in limine. The prosecutor argued that Gregory's statement to Harris that Martin told him to shoot Cline was a statement against penal interest, and was therefore an exception to the hearsay rule. The trial court ruled that the statement was admissible as a statement against penal interest, and was also admissible as a spontaneous declaration. The trial court found the statement was not testimonial in nature, and that it was made with sufficient indicia of trustworthiness to be admitted.

At trial, Harris testified Gregory told him Cline was dead. Gregory said that Martin had told him to "Shoot, shoot." Harris told the officers who interviewed him that Gregory admitted to shooting Cline.

Martin's attorney elicited from Harris that Gregory claimed Martin shot Cline in the chest, and that when Cline was being robbed he said, "I know it's you, Vince. I know who you are, Vince and Raymond. I know it's you. I know it's you. You're not robbing me."

When the prosecutor discussed Gregory's statement to Harris during closing argument, he told the jury to be cautious of the statement of an accomplice, and that Gregory clearly was an accomplice. He reminded the jury that it could not use the statement of an accomplice to prove a fact unless there was corroborating evidence. He then argued:

> "Well, you gotta be careful with this, because we know from Anna McDonald that these things were not said. She was there. She's got no dog in this fight. She's got no spin as far as what it is these intruders are saying. And she does not say anything about anybody saying -- or Doug Cline saying, 'It's you, Vince and Raymond.' None of this Raymond stuff came from Doug Cline. That is not true.
>
> So the extent that you've got Vincent Gregory saying this to Travis Harris, he is not telling him something that's true. So he's not a reliable relater of events insofar as that's concerned.
>
> We also know from her that there was no statement to the effect of, 'Shoot him,' by any other participant in this trial during the course of the shooting. The words said before the shots were, 'I will kill you,' or words to that effect by suspect number one. According to Anna McDonald, suspect number two is trying to get out of the way as Doug Cline is charging suspect number one. He's not saying anything.
>
> In other words, Vincent Gregory's relation of what's going on in that to his dad, his street dad, is not accurate. But he is indicating during the course of that statement that he, that is to say, Vincent Gregory is shooting Douglas Cline. He's basically confessing a crime. And he's relating by implication who else is involved with him in it, Raymond Martin."

Martin argues the trial court erred in admitting Gregory's statement because it was neither a declaration against penal interest nor a spontaneous declaration, thus was inadmissible hearsay, and because admission of the statement violated the Sixth Amendment. Martin also argues the prosecutor committed misconduct in arguing for the admission of the statement.

The statement against interest exception to the hearsay rule permits admission of only the portions of a declarant's statement that are "specifically disserving" to the declarant's interest. (*People v. Leach* (1975) 15 Cal.3d 419, 441.) Under this particular exception to the hearsay rule, the trial court must redact any portion of a statement not specifically disserving to the declarant. (*People v. Duarte* (2000) 24 Cal.4th 603, 612.)

However, a statement of one defendant that implicates another is admissible provided it satisfies the statutory definition of a declaration against interest and satisfies the constitutional requirement of trustworthiness. (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 176-177.) "'This necessarily requires a "fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity involved; . . ." [Citation.]'" (*Ibid*.)

In this case, the statement that Martin told Gregory to shoot, and that Gregory did shoot and kill Cline, was sufficiently against the penal interest of Gregory to satisfy the exception. Gregory's statement that Martin told him to shoot was against Gregory's interest because it implicated Gregory as the shooter.

There was also evidence of trustworthiness. As the prosecutor argued at the hearing on the motion in limine, circumstances, as well as other testimony, corroborated Gregory's statement to Harris. For example, Gregory told Harris

they entered Cline's house through a sliding glass door, and this information was corroborated by Gregory's confession to investigators. Gregory told Harris they were wearing masks during the incident, which was confirmed by McDonald, and by the recovery of masks containing the DNA of two of the defendants. Gregory told Harris that Martin tied up the victim, which was confirmed by McDonald's statement that the person with the dark jacket and fur hood tied up Cline. Gregory told Harris that Cline kept calling his name, a fact corroborated by McDonald. Gregory told Harris Cline was shot in the head and chest, a fact corroborated by the autopsy. All of this was sufficient evidence to support the trial court's conclusion that the statement was trustworthy, even if McDonald did not remember hearing Martin tell Gregory to shoot Cline, and even if the prosecutor later argued the statement was not made.

The statement also qualified as an exception to the hearsay rule because it was a spontaneous declaration. Martin claims the statement did not qualify as a spontaneous declaration because Gregory spoke with Harris a few hours after the killing, and there was time for Gregory to "contrive and misrepresent." Martin also claims Gregory's statement was in fact contrived, as later admitted by the prosecutor in closing argument.

Whether Gregory's statement met the requirements of a spontaneous declaration presents a question of fact over which the trial court exercises its reasonable discretion. (*People v. Smith* (2007) 40 Cal.4th 483, 519.) We conclude the trial court did not abuse its discretion.

Evidence Code section 1240 provides:

> "Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
>
> (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

Gregory's statement clearly satisfied the first requirement.

As to the second requirement, the passage of time does not deprive the statement of the required spontaneity if it was made under the stress of excitement while the reflective powers were in abeyance. (*People v. Brown* (2003) 31 Cal.4th 518, 541.) "'The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . the mental state of the speaker. The nature of the utterance -- how long it was made after the startling incident and whether the speaker blurted it out, for example -- may be important, but solely as an indicator of the mental state of the declarant. . . . [U]ltimately each fact pattern must be considered on its own merits, and the trial court is vested with reasonable discretion in the matter.' [Citation.]" (*Ibid.*)

In this case, Harris testified that Gregory called him on the phone sometime between 6 a.m. and 9 a.m. on the morning of the shooting. The sheriff's department received the call dispatching them to the scene at 6:11 a.m. Thus, Harris talked

to Gregory between a few minutes to three hours after the shooting. Gregory was crying and sounded distraught. Harris saw Gregory 20 to 30 minutes later. Gregory was crying, would not stand still, was moving around and fidgety, and appeared to be under the influence of methamphetamine. This evidence sufficiently established that Gregory was speaking "under the stress of excitement and while the reflective powers were still in abeyance." (*People v. Brown, supra*, 31 Cal.4th at p. 541, italics omitted.)

There was no confrontation clause violation because Gregory's statement was not testimonial. Martin argues *Bruton v. U.S.* (1968) 391 U.S. 123 [20 L.Ed.2d 476], not *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177], determines whether the statement of a non-testifying co-defendant is admissible.

The *Bruton* rule bars the admission of one defendant's out-of-court statement that incriminates a codefendant. (*Bruton*, *supra*, 391 U.S. at pp. 135-136 [20 L.Ed.2d at p. 485].) The rule assumes that the statement is inadmissible hearsay against the codefendant. (*People v. Smith* (2006) 135 Cal.App.4th 914, 922.) "[I]f the statement is *admissible* against the codefendant under a hearsay exception, and its admission otherwise survives confrontation analysis, then the jury may consider it against the codefendant; no reason exists for severance or redaction." (*Ibid.*)

The confrontation clause of the Sixth Amendment is concerned solely with hearsay statements that are testimonial.

(*Davis v. Washington* (2006) 547 U.S. 813, 821-825 [165 L.Ed.2d 224, 237-239].) "[I]t is the 'involvement of government officers in the production of testimonial evidence' that implicates confrontation clause concerns." (*People v. Geier* (2007) 41 Cal.4th 555, 605.) Gregory's statement to Harris was not a formal statement to a government officer, but an informal statement to a friend, thus was not testimonial and did not violate the confrontation clause. (*People v. Jefferson* (2008) 158 Cal.App.4th 830, 842.)

Because Gregory's statement was not inadmissible hearsay, and was not testimonial, it was admissible under both *Bruton* and *Crawford*.

Because we conclude the statement of Gregory was admissible under two exceptions to the hearsay rule, and did not violate the confrontation clause because it was not testimonial, the prosecutor did not commit misconduct in arguing for its admission.

B. *No Police Misconduct Respecting Davison's Testimony*

Martin argues his right to a fair trial and due process was violated when law enforcement intentionally implanted fear in Davison in an attempt to bias her testimony against him. We shall conclude that Martin forfeited this claim of misconduct by failing to raise it below.

The factual support for Martin's claim comes from his own in limine motion to compel the disclosure of a confidential informant. The motion stated in pertinent part:

> "Det. Frank Cioli, Sacramento County Sheriff Department (SSD) badge number 2313, reported on April 17, 2006, that he had received information from a confidential informant that Raymond Martin stated that he was going to get the witness, Danielle Davidson [sic], 'out of the picture.' (D 3115.) Det. Cioli told Det. R. Kolb, SSD 260, and she in turn contacted Danielle Davidson [sic] and informed her of the threat. (D 3113-3114.)"

Based on this information, Martin argued the identity of the confidential informant should be disclosed. In making this argument, Martin also claimed that the prosecution should be forced to disclose the informant's identity because if there were no confidential informant, then law enforcement would have "poison[ed] the well[.]" Martin now claims law enforcement intentionally biased Davison's testimony against him when it informed her of his threat, resulting in a denial of the right to a fair trial and due process.

We conclude this claim is akin to one of prosecutorial misconduct, which involves a showing that the defendant's right to a fair trial was prejudiced. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 35.) We also conclude that like a claim of prosecutorial misconduct, the argument is forfeited unless a timely and specific objection is made. (*People v. Bolden* (2002) 29 Cal.4th 515, 562.) Even were the claim not forfeited, the burden of proof is on the defendant to show the existence of misconduct. (*People v. Van Houten* (1980) 113 Cal.App.3d 280, 292.) There is no evidence here that the threat against Davison was not real, or that the police informed her of the threat in order to influence her testimony. There is no evidence her

testimony was influenced by the threat, or that it was false in any manner.

Martin also argues the trial court erred in refusing to hold an in camera hearing to disclose the identity of the confidential informant. There was no error.

"'[A] defendant seeking to discover the identity of an informant bears the burden of demonstrating that, "in view of the evidence, the informer would be a material witness on the issue of guilt and nondisclosure of his identity would deprive the defendant of a fair trial." [Citations.] That burden is discharged, however, when defendant demonstrates *a reasonable possibility that the anonymous informant whose identity is sought could give evidence on the issue of guilt which might result in defendant's exoneration*.' [Citation.]" (*People v. Borunda* (1974) 11 Cal.3d 523, 527.)

In determining whether the identity of a confidential informant must be disclosed, cases distinguish between a "mere informer" and a person who was or could be a material witness for the defense. (*People v. Garcia* (1967) 67 Cal.2d 830, 836.) A "mere informer," whose identity need not be disclosed, is one who "'"simply points the finger of suspicion toward a person who has violated the law[,]"' but '"plays no part in the criminal act with which the defendant is later charged."' [Citation.]" (*Ibid*.) A material witness, on the other hand, is one whose identity is relevant to the issue of guilt, and whose identity may be helpful to the defendant on that issue. (*Ibid*.) A defendant discharges his burden of demonstrating that the

confidential informant is a material witness by demonstrating a reasonable possibility that the informant "could give evidence on the issue of guilt which might result in defendant's exoneration." (*Id.* at p. 840.) Defendant's showing must be more than mere speculation. (*People v. Luera* (2001) 86 Cal.App.4th 513, 526.)

Martin presented only two rationales for the disclosure of the confidential informant's identity: (1) the possibility that the informant would be able to impeach the testimony of Davison, and (2) the possibility that there was no informant. There was no evidence to support either of these suppositions, and both were mere speculation. The trial court did not err in determining that the confidential informant was not a material witness to Martin's guilt or innocence and in refusing an in camera disclosure of the informant's identity.

C. *No Error in Omitting Expert Testimony*

Martin filed a motion in limine to suppress his statement to police on the ground his *Miranda*[8] waiver was not knowing and intelligent because of his drug use. The trial court held an evidentiary hearing on the issue at which Martin presented the testimony of Dr. Christopher Heard, a psychologist testifying as an expert on Martin's behalf. Heard gave his expert opinion after reviewing the video-recording and transcript of Martin's interviews, plus the toxicology and police reports.

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[8] *Miranda v. Arizona, supra,* 384 U.S. 436 [16 L.Ed.2d 694].

Heard testified that the toxicology report showed Martin had .27 milligrams per liter of methamphetamine in his bloodstream at midnight on December 30, 2005. The interview in question ran from approximately 7:30 p.m. to midnight.

Heard testified that during the withdrawal phase of methamphetamine use, the user tended to exhibit fatigue, sleepiness, irritability, memory problems, confusion, emotional fragility, and possibly psychosis. He testified that Martin displayed an extreme state of fatigue, a state of mental confusion, and psychomotor retardation. He said Martin appeared to be suffering from extreme sleep deprivation, to the extent he appeared to actually nod off during the course of the interrogation. Heard testified that the manifestations of crashing exhibited by Martin were: fatigue, problems with focus and concentration, indecision, emotional fragility, and memory problems. He stated someone who was crashing might not be able to recall things that happened when he was high.

Heard testified that extreme sleep deprivation slowed down the thought process. He stated, "I'm not saying it's really what was going on or not -- when you see these long pauses, when he can't really decide what it is he's going to do. On the one hand, it could be just game playing. On the other hand, it could be he's trying to take into consideration a number of factors in a relatively complex mental operation, and he just hasn't got the speed to do it."

Martin's attorney referred to Heard's report, stating, "Now, you've made an opinion in here. What's your opinion of

whether or not he knowingly, intelligently waived his Miranda rights?" The prosecutor's objection to this question was sustained. Martin's attorney then read a portion of Heard's report, quoting, "given the totality of the evidence reviewed by me, it appears that his will to resist questioning and to comprehend his options in response to the advisements and subsequent questioning of the sheriff's department was impaired at the time of the first interrogation." Heard replied, "Correct." The prosecutor objected on relevance grounds and moved to strike. The trial court sustained the objection and granted the motion to strike. However, the trial court later allowed Heard's written report into evidence over the prosecutor's objection.

Martin now claims the trial court erroneously excluded Heard's opinion that Martin did not knowingly and intelligently waive his *Miranda* rights. This argument is misguided, since the trial court admitted Heard's entire report, which Martin's attorney indicated contained his opinions regarding Martin's ability to comprehend and knowingly and intelligently waive his *Miranda* rights.

Martin argues the trial court erroneously used Martin's conduct during the interrogation as the controlling criterion in deciding if the waiver was valid. There is no evidence to support this. The trial court indicated it reviewed the transcript as well as the videotape of the interview, and read the pertinent case law. As previously indicated, the court listened to the testimony of Heard, as well as the testimony of

Jeffery Zehnder, a forensic toxicologist. The trial court admitted Heard's report into evidence.

The proper standard for the trial court to determine whether a defendant has waived *Miranda* rights is whether the waiver was knowing and intelligent under the totality of the circumstances surrounding the interrogation. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 86.) The trial court properly considered the totality of the circumstances. It did not err in admitting Martin's statement.

D. *Failure to Instruct on Manslaughter*

In a supplemental brief, Martin argues the jury should have been given an involuntary manslaughter instruction, and that the failure to do so was a violation of his right to equal protection. We conclude any error was necessarily harmless.

The jury found true the special circumstance that the murder of Cline was committed by Martin while Martin was engaged in the commission of the crimes of burglary and robbery, within the meaning of section 190.2, subdivision (a)(17). Any error was necessarily harmless in light of these findings, since the killing was necessarily first degree felony murder, and no finding of a lesser offense was possible. (*People v. Price* (1991) 1 Cal.4th 324, 464.)

E. *Actual Time Credit*

The trial court failed to award any presentence custody credits. Section 2900.5 provides that a defendant shall be credited for time served in all felony and misdemeanor convictions. The People concede that Martin is entitled to 802

days of actual presentence custody credit. As with Mason, we recognize that Martin has preserved this argument should his conviction be reversed by another court. Otherwise, it is a waste of judicial resources for this court to consider the argument, since Martin was sentenced to life without the possibility of parole.

F. *Parole Revocation Fine Correctly Imposed*

The trial court imposed a $10,000 parole revocation fine and suspended its payment unless parole was revoked. Martin argues the fine was unauthorized because he was sentenced to life in prison without the possibility of parole. In light of the Supreme Court's holding in *People v. Brasure, supra,* 42 Cal.4th at page 1075, the fine was appropriate. *People v. Brasure, supra*, held that where a defendant is subject to a prison term that includes a period of parole in addition to a sentence of life without the possibility of parole, the fine is required by statute. (*Ibid.*) Martin was sentenced to the upper term of nine years for the assault with a deadly weapon conviction. The trial court properly imposed the parole revocation fine in this case.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

RAYE, J.

CANTIL-SAKAUYE, J.